BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARLEN D. RIGGS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,033,210
UNITED PARCEL SERVICE INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 9, 2008 preliminary hearing Order of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded benefits in the form of medical treatment with Prem Parmar, M.D., as the authorized treating physician.

Claimant appeared by his attorney, Michael H. Stang of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert J. Wonnell of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Evidentiary Deposition of Mark Bowen dated April 12, 2007, with attachment; the Evidentiary Deposition of John Gutierrez dated April 12, 2007; the transcript of the hearing regarding the Motion To Withdraw held August 14, 2007; the transcript of the Preliminary Hearing held April 8, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident on the date alleged? Claimant alleges a series of accidents through February 9, 2007, while working as a delivery truck driver for respondent. Respondent contends claimant, when asked, denied suffering any work-related injuries while at work. Claimant argues he told respondent's business

manager, Mark Bowen, and claimant's immediate supervisor, John Gutierrez, that he had hurt his shoulder from using a truck without power steering and while repeatedly opening the door to the back of the delivery truck.

2. Did claimant's injuries arise out of and in the course of his employment with respondent? Respondent contends the injuries to claimant's left shoulder are the result of claimant relocating to a new apartment the first of February 2007, and not the result of any work-related activities. Claimant denies suffering any injuries while relocating to the new apartment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges that he suffered a series of accidental injuries to his left shoulder as the result of using a truck not equipped with power steering and having to repeatedly open and close the door to the back of his delivery truck. Claimant testified that he talked to his supervisor, John Gutierrez, about the problems with his left shoulder and was advised no replacement driver was available and claimant would just have to continue working. No medical treatment was offered. Claimant then went to his personal physician, Curtis Moore, M.D., on February 12, 2007. The report from Dr. Moore of that date describes claimant doing heavy lifting, pushing and pulling at work. It also notes no particular injury suffered by claimant. Claimant contacted Mark Bowen, respondent's business manager, and advised Mr. Bowen of his problems with the shoulder. Mr. Bowen asked if claimant's injuries were work related, and claimant said no. Claimant was then referred to the union to file for union disability. Claimant contacted Mr. Bowen a short time later and advised him that the union had told claimant he had to have hurt his shoulder at work. Claimant testified that he had not hurt his shoulder doing any activity other than working for respondent.

Mr. Gutierrez was claimant's supervisor and would be the one claimant would tell about any work-related injuries. Mr. Gutierrez would then report any injury claim to Mr. Bowen, and an accident report would be completed. However, Mr. Gutierrez testified that claimant never mentioned any shoulder injury. Mr. Gutierrez denied that claimant talked to him about hurting his shoulder and denied that claimant requested medical treatment for the shoulder. He did not find out about the injury claim until he was told by Mr. Bowen.

Mr. Bowen testified that claimant first told him the injury did not occur at work. He sent claimant to the union in order for claimant to apply for union disability benefits. When

claimant contacted him a short time later, claimant was alleging the injury occurred from overuse of the shoulder while driving a vehicle without power steering and while repeatedly opening the door of the delivery truck. Claimant also told Mr. Bowen that he was advised he would get more money with a workers compensation claim than he would with union disability benefits. Mr. Bowen also noted that claimant had requested time off work in early February 2007 to relocate to a new apartment. Mr. Gutierrez also testified to claimant's request for time off to relocate. However, neither could testify that claimant had injured his shoulder while moving. Additionally, claimant returned to work after this move and performed his job duties with no apparent problem.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

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[1] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2006 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

The only dispute in this matter stems from whether claimant's version of the events leading up to his filing a workers compensation claim are to be believed, or whether the versions from Mr. Bowen and Mr. Gutierrez are the most credible. Claimant denies any other source of injury, and no one from respondent can state with any certainty that claimant was injured while moving to a new apartment. The fact that claimant denied any work-related injury initially is not surprising. Claimant is not an expert in workers compensation litigation. The fact a person can file a claim after suffering a series of microtraumas over a long period of time is a concept that confuses certain workers compensation attorneys. The appellate courts have long struggled with the simple concept of identifying a date of accident when dealing with microtrauma injuries.[5] Here, claimant was forthright with Dr. Moore that he did not know of any injury to his shoulder. But claimant, in his simple honesty, did identify that he performed heavy lifting, pushing and pulling at work.

This Board Member finds for preliminary purposes that claimant did suffer accidental injury to his left shoulder through a series of traumas up to February 9, 2007. The Order of the ALJ should, therefore, be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered a series of accidental injuries arising out of and in the course of his employment with respondent through February 9, 2007. Therefore, the Order of the ALJ granting claimant medical treatment with Dr. Parmar should be, and is hereby, affirmed.

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[5] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[6] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 9, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

HONORABLE GARY M. KORTE

c: Michael H. Stang, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge